United States Court of Appeals

for the Second Circuit

APPENDIX

75-2120

To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARTHELMIO DALLI and
THOMAS PYTEL,

Petitioners-Appellants,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

Docket No. 75-2120

B
P/S

APPENDIX TO THE BRIEF
FOR PETITIONER-APPELLANT
THOMAS PYTEL

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant THOMAS PYTEL
FEDERAL DEFENDER SERVICES UNIT
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JONATHAN J. SILBERMANN,
Of Counsel.

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PAGINATION AS IN ORIGINAL COPY

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
BARTHELMIO DALLI, Petitioner -against- UNITED STATES OF AMERICA, Respondent	For plaintiff: Krieger, Fisher, Metzger & Scribner 401 Broadway New York, New York 10013 Robert P. Lewis (assgnd) Metcalf Plaza P.O. Box 124, Auburn, NY 13022 (for Thomas Pytel) For defendant: James M. Sullivan, Jr. U.S. Attorney Federal Bldg. Albany, NY 12207 (Paul V. French, Asst.U.S.Atty)

STATISTICAL RECORD	COSTS		DATE 1974	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk		Mar.18	Krieger,Fisher etc.	5 00	
			" 19	Dep.Cr.Tr.U.S.		5 00
J.S. 6 mailed	Marshal		1975			
			June 27	Krieger,etc.	5 00	
Basis of Action:	Docket fee		" 30	Dep.Cr.Tr.U.S.		5 00
Petition for Writ of Habeas Corpus	Witness fees					
	Depositions					
Action arose at:						

UNITED STATES COURT OF APPEALS FILED JUN 27 1975 CLERK

TE 974	PROCEEDINGS	Date Order Judgment N
. 18	(1) Filed Petition for Writ of Habeas Corpus	
18	(2) " Memorandum of Facts and Law	
" 18	Papers forwarded to Judge Lloyd MacMahon for consideration	
ne 19	(3) Filed Amended petition for writ of Habeas Corpus by Attorney Krieger for petitioner Dali	
ne 19	(4) Filed Supplemental Memornadum of Law filed by Albert J. Krieger	
ly 5	(5) " petition for writ of habeas corpus ad testificandum for Thomas Pytel	
" 5	Writ issued	
" 5	(6) Filed petition for writ of habeas corpus ad testificandum for Stanley Simmons	
5	Writ issued	
" 15	(7) Filed Petition of Albert J. Krieger for writ of habeas corpus ad testificandum for Barthelmio Dalli	
15	Writ issued	
" 23	(8) Filed CJA 20 form appointing Robert P. Lewis for Thompas Pytel	
" 22	Trial Hearing on 2255 Application. Witnesses for Petitioner Dalli.	
" 23	Hearing continued. Counsel for all parties agree to certain exhibits being marked evidence and/or stipulate to what certain witnesses would say if called to testif Counsel state they would like an additional 2 hours to review the tapes of the wi and weed out ones that are relevant. Granted. Counsel indicate they have 20 add tapes to review and request that case be adjourned until tomorrow morning. SO ORDE	
" 24	Hearing continued. Counsel give progress report on their work reviewing the tape Witness for petitioner Dalli.	
" 25	Hearing continued. Witnesses for Dalli. Court will meet tomorrow with impartial State Police Officer and Clerk of Court to review the tapes that counsel have agr upon for submission to the Court.	
" 26	Hearing continued. Court meets without counsel and Stenographer. NY State Troope (BCI) man present for purpose of operating recording equipment for Court. BCI Ma present on stipulation of Counsel for all parties. Court indicates he desires ta be transcribed onto his own tape recorder if possible and that tape cassette of h own be kept in custody of Clerk until his arrival next week for continuation of h in this case. Above accomplished in absence of Judge but in presence of State T and Clerk	
ug 1	Hearing continued. Witnesses called.	
" 2	TRIAL-Witnesses for petitioner. Motion for production of certain documents. Jud MacMahon directs Govt. produce any and all documents with regard to tapes or any wiretaps on Pytel's home in Canada	
5	Trial continued. Witnesses for petitioner. Motion for additional time to get Su Kirwin of NY State Police to Auburn to testify. Court advised Mr. Kirwin will n available until Wed. August 7, 1974 to testify in person. Counsel for all parti agree to fly to Hancock Airport in Syracuse to meet with Mr. Kirwin and take his deposition.	
6	Trial continued. Copy of deposition of Supt. Kirwin, NY State Police marked into evidence. Mr. Krieger indicates he cannot go ahead with hearing until he contact witness in Washington to see what he has to say. Judge directs government try to assist Petitioner 's Counsel in finding witness Mr. Finlater, formerly of the BND	
" 7	Trial continued. Mr. French moves for dismissal of Petition of Dalli and Pytel. Mr. Krieger heard in argument. Decision reserved on motion to dismiss. Mr. Frenc rests for government. Mr. French renews motions and decision is reserved. Judg MacMahon directs petitioners submit memorandum of law one month after receipt of transcript of this hearing. Government has one month thereafter to reply to peti Memorandum. Petitioners have 10 days thereafter to reply to government's memoran Mr. Lewis moves for copy of transcript of this proceeding be provided him free of c Motion granted.	
pt. 27	Filed transcript of hearing held July 22, 1974 at Auburn before Judge Lloyd F. Ma	
t. 2	" copy of CJA form 21	

74-CV-114

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date O Judgme
1974	(11)	
Oct. 2	Filed transcript of hearing held Aug. 1, 1974 at Auburn before Judge MacMahon	
Nov. 14	(12) Filed Memorandum of law in support of Dalli's Petition for Writ of Habeas Corpus	
" 22	(13) Filed brief for petitioner	
" 27	(14) " affidavit of service of Memorandum of Law	
1975 Jan. 16	(15) " copy of Memorandum of Law in opposition to Dalli and Pytel petition for Writ of Habeas Corpus with letter of U.S.Attorney's off re sending original to Judge MacMahon	
Feb. 6	(16) Filed rebuttal memorandum	
May 29	(17) Filed Traverse to Government's Opposition	
June 6	(18) " Endorsement of Judge Lloyd F. MacMahon denying petition by Barthelmio Dalli and Thomas Pytel for post-conviction relief. Opinio to follow within ten days-SO ORDERED-HON. LLOYD F. MacMAHON, USDJ	
" 12	(19) Filed opinion denying petitioners' application to vacate their senter in all respects	
" 12	(20) Filed judgment	
" 16	Mailed cards re judgment to Hon. James M. Sullivan, Jr., Krieger, Fisher, Metzger & Scribner, and Robert P. Lewis	
June 19	(21) Filed Notice of Appeal (Pytel)	
" 27	(22) " Notice of Appeal (Dalli)	
July 8	(23) Filed Copy 2 of CJA 20	

#19

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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BARTHELMIO DALLI and THOMAS PYTEL,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

----------x

74-CV-114

OPINION

APPEARANCES:

Albert J. Krieger, New York, N.Y., for petitioner Dalli.

Robert P. Lewis, Auburn, N.Y., for petitioner Pytel.

James M. Sullivan, Jr., U.S. Atty. for the Northern District of New York, for respondent; Paul V. French, Asst. U.S. Atty., Albany, N.Y., of counsel.

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MacMAHON, District Judge.

This application for post-conviction relief, brought under 28 U.S.C. § 2255, presents a third attempt

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* Of the Southern District of New York, sitting by designation.

to reopen issues previously heard and determined against petitioners.

Petitioners Dalli and Pytel were convicted by a jury on May 26, 1969 on one count of selling, receiving and concealing five kilograms (approximately eleven pounds) of heroin, in violation of 21 U.S.C. §§ 173 and 174, and on one count of conspiracy to commit the substantive offense. Each was sentenced on June 13, 1969 to twenty years imprisonment on each of the counts, the sentences to run concurrently.

The convictions were affirmed on appeal. United States v. Dalli, 424 F.2d 45 (2d Cir.), cert. denied, 400 U.S. 821 (1970). The facts of the case are fully narrated in the opinion of the Court of Appeals. Suffice it to say here that Dalli, a resident of New York City, was arrested and five kilograms of pure heroin seized from his automobile on September 10, 1968 while he and a co-defendant, Simmons, were returning to New York on the New York thruway after purchasing the heroin from the Canadian defendants Pytel and Bourdeau, whom they had met that day at the Holiday Inn in Plattsburgh, New York.

Petitioners and their co-defendants moved before trial to suppress certain evidence, including the five kilograms of heroin, on the ground that the seizure was the fruit of tainted information learned from wiretaps by the New York state police. Following a full evidentiary hearing, we denied the motion, finding that the search was incident to a lawful arrest based on probable cause and that neither the arrest nor the seizure was tainted by wiretaps. Our findings and conclusions were set forth in three opinions which are appended to our opinion in Simmons v. United States, 354 F. Supp. 1383 (N.D.N.Y. 1973). A summary of those findings and conclusions is necessary to put the present application in proper perspective.

All the wiretaps challenged by the defendants upon the suppression hearing had been duly authorized under New York law (N.Y. Code Cr. Proc. §§ 814-825 (as of 1968)[1] and all recordings and transcripts of all of the tapes were produced and delivered to the defendants and their counsel for selection of any which they deemed relevant. After thorough examination, the defendants selected only one, a wiretap on the telephone line of Beautee Trail Hair Stylists, Inc., which intercepted a

telephone conversation between Dalli and Simmons on September 7, 1968 to the effect that they would meet at 7:00 o'clock that evening. It then appeared from reports of the Federal Bureau of Narcotics and Dangerous Drugs (BNDD), also made available to defendants, that federal agents had observed the 7:00 o'clock meeting.

All witnesses desired by the defendants were produced. The defendants called John T. O'Brien, the BNDD agent in charge of the investigation of the defendants; his superior, George R. Halpin; Agent John W. Maltz, who observed a meeting between Dalli and Simmons on September 7, 1968; and Lieutenant Charles Cassino of the New York state police, who was in charge of a parallel investigation of the defendants by the state police.

Agent O'Brien testified that he did not learn any information from any wiretaps during the course of the federal investigation and that he had no knowledge of any wiretaps relating to the defendants by the New York state police until about two weeks before the suppression hearing (May 12, 1969). Halpin testified that the BNDD had not received any information from the state police learned as a result of wiretaps or otherwise which

led to the investigation and arrest of the defendants. Lieutenant Cassino of the state police testified that he did not reveal any information learned from state wiretaps to anyone connected with the BNDD.

Despite exhaustive examination of all the witnesses, the defendants failed to establish any connection between any wiretap and surveillance of any defendant, or the observation of the defendants Dalli and Simmons at the 7:00 P.M. meeting, or, ultimately, the arrest and seizure of the narcotics.

Following affirmance of their convictions, petitioner Dalli and his co-defendant Simmons raised the identical wiretap issue a second time, on November 16, 1972, in petitions for post-conviction relief under 28 U.S.C. § 2255, claiming that the prosecution[2] knowingly used perjured testimony upon the suppression hearing in that Agent O'Brien's testimony that he was unaware of the state wiretaps until two weeks before the suppression hearing and that he did not learn any information from any wiretaps during the course of the federal investigation was false. The claim at that time was based on an affidavit of former Lieutenant Charles Cassino, who was

then confined to a federal penitentiary following his conviction on January 27, 1972 in the United States District Court for the Southern District of New York on one count of interstate and foreign travel or transportation in aid of racketeering enterprises, in violation of 18 U.S.C. § 1952, and one count of conspiracy to commit the substantive offense, in violation of 18 U.S.C. § 371. See United States v. Cassino, 467 F.2d 610 (2d Cir. 1972).

Much of Cassino's affidavit was a reiteration of the allegations and claims previously considered and rejected on the suppression hearing. We, therefore, refused to consider those claims again.[3] However, as allegedly new evidence, Cassino claimed that after the September 7 meeting between Dalli and Simmons, the state police tapped

> "telephone numbers presently unknown to me located at or near the residence of Dalli. . . . It was on these telephones that an arrangement was made between Simmons and Dalli to go to upstate New York on September 10, 1968. My best recollection is that that telephone conversation took place on September 9, 1968 and was first heard by our office early in the morning hours of September 10, 1968. . . . Subsequent to May 1969, I learned

> that it was a common practice during the course of this investigation for Investigator Kaynor /sic/ to take the tapes representing the previous day's eavesdropping and together with Agent John J. O'Brien of the Bureau of Narcotics and Dangerous Drugs, go to . . . /a cubicle designed for audition of recorded telephone conversations/ and there review the tapes. . . . As far as the 10th itself is concerned, I received a call early in the morning from Investigator Kaynor /sic/ who told me of this probable meeting and I ordered him to contact all necessary parties immediately as to what we anticipated would occur. . . . Amongst those whom Investigator Kainor /sic/ was to contact were Agents of the Bureau of Narcotics and Dangerous Drugs. The investigation and surveillance of September 10, which resulted in the arrest of Dalli and Simmons, Pytel and Bordeau, came about as a result of the orders which I gave after receiving the information from Investigator Kainor /sic/ concerning the meeting between Dalli and Simmons."

We denied the petitions without a hearing, finding, among other things, that Cassino's allegations were indefinite, vague and conclusory and that, insofar as he sought to connect information by the state police from wiretaps on unknown telephones to the arrest of petitioners and seizure of the narcotics by federal agents, his statements were hearsay too insubstantial to require

a hearing or to support the petition.

The Court of Appeals agreed with our determination,[4] and in an opinion by Judge Mansfield demonstrated the specific deficiencies and omissions of the Cassino affidavit. Thus, for example, the court noted that while Cassino stated that he "learned that it was a common practice . . . for Investigator Kaynor /of the New York State Police/ to take the tapes representing the previous day's eavesdropping and together with Agent John J. O'Brien of the Bureau of Narcotics and Dangerous Drugs, to go to one of these rooms and review the tapes," he did "not say how or from whom he learned this;" that there was "no indication that the wiretaps or transcripts of them were in fact furnished to the federal officers;" and that Cassino's averment that "telephone numbers presently unknown to me located at or near the residence of Dalli were tapped" was too indefinite to determine whether it was "based on hearsay or on Cassino's personal knowledge. . . ."

Four months after the decision of the Court of Appeals, counsel for Dalli filed the present amended petition incorporating the earlier petition and asserting

that "the deficiencies noted by the Court of Appeals are completely cured by the present petition." The petition contained two affidavits, one from Charles Cassino and the other from former BNDD Agent Dennis J. Hart.

Cassino, curing the deficiencies, now remembered that Special Agent O'Brien had told him that he, O'Brien, was aware during the investigation of the state police wieretaps on the Beautee Trail Beauty Parlor and "that without the N. Y. S. P. wiretaps, the FBNDD would never had made /sic/ this case." Cassino also now swore that Investigator Kayner of the state police also told him that O'Brien was aware of the wiretaps. Special Agent Hart swore that Special Agents O'Brien and Halpin told him during the course of the investigation that the state police had a wiretap on the Beautee Trail; that he, Hart, should not let the newer agents working on the surveillance know about these wiretaps; and that Investigator Kayner was passing information from the wiretap to the federal agents.

The factual dispute created by these allegations of newly discovered evidence was, therefore, clearly focused. Did the federal agents in fact receive

information from the New York state police wiretaps? If so, were the wiretaps illegal, and if found to be illegal to what extent did this information taint the federal investigation?

In order to resolve these issues and on consent of the government, we held an evidentiary hearing. Petitioners called witnesses seeking to establish their claim that the federal agents had been given information from the state police wiretap. After having observed the testimony of the witnesses at the hearing and having carefully and exhaustively reviewed the transcript of that hearing and the prior hearing and trial, we conclude that the petitioners have failed to establish their claim that the federal agents received any information from the state police wiretaps.[5] Thus, we do not reach the question of the legality of the state wiretap order and, consequently, the question of taint.

The testimony presented at the hearing was in large part a repetition of the testimony presented during the pretrial suppression hearing and trial. We will review it, therefore, only to the extent that it pertains to the allegedly newly discovered evidence.

I. Cassino's Testimony

Charles Cassino testified that in April 1968 he was a Lieutenant with the New York State Police and in charge of a detail of state police narcotics investigators stationed at Wards Island, New York. Petitioner Dalli was the subject of one of Cassino's investigations and during the course of the Dalli investigation wiretaps were installed at Beautee Trail Hair Stylists, Inc. in Brooklyn and in two other locations. Cassino testified that in August 1968 he told George Halpin, a BNDD supervisory agent, that "we were doing our thing" at the Beautee Trail. Cassino interpreted this statement to mean that he had told Halpin that the state police were using wiretaps.[6]

Cassino further testified that in May 1968 he assigned Investigators Kayner, Rock, Smith, Gross, Palumbo and others to work on the Dalli investigation, including manning the wiretaps. He testified that his investigators were instructed to cooperate with federal agents but that he understood that the federal agents were to do only physical surveillance. He further testified that in August and September 1968 he had seen Agent O'Brien

with Investigator Kayner, and on an unspecified number of occasions he saw Agent O'Brien sitting in cubicles with Investigator Kayner. These cubicles, according to Cassino, were commonly used to transcribe tapes. However, based on Cassino's prior testimony at the original suppression hearing categorically denying that any information from the wiretaps was ever given to the federal agents, we must conclude that these observations, if they ever actually occurred, did not suggest to Cassino that O'Brien was being given information from the wiretaps.[7]

Cassino also testified that in December 1971 he had four conversations with Investigators Kayner and Mermel. During the course of several of these conversations, Kayner is supposed to have told Cassino that "not only O'Brien but others know about it," referring to the Beautee Trail wiretap. During cross-examination, it became apparent that these conversations were in the context of information Cassino was giving to Kayner and Mermel about corruption within the New York State Police. This occurred after Cassino's federal conviction and before sentence. During the course of the third conversation, Investigators Mermel and Kayner were concerned

about how information about this wiretap was "leaked" to Simmons' lawyer prior to the May 1969 suppression hearing. Cassino denied that he was the "leak" and said that Investigators Kayner and Mermel told him that they suspected Agent O'Brien. It should be noted that during cross-examination, Cassino, in describing the substance of these conversations, omitted any reference to Kayner's having told him that O'Brien knew of the wiretaps and added it only as an afterthought after completing his description of the conversations.[8]

Cassino also testified that in January or February 1972, when he and Agent O'Brien were travelling together to Utica, New York to testify at the trial of co-defendant Stanley Simmons, O'Brien admitted to Cassino that he, O'Brien, "had known about the Beautee Trail wiretap since its inception." At the time of this conversation, Cassino had been convicted of conspiracy and violation of interstate gambling statutes. During this alleged conversation, O'Brien was under indictment for perjury.

There are a number of factors which lead us to conclude that Cassino's testimony as to this admission

by O'Brien is totally perjurious: Cassino's prior testimony; his demeanor as a witness; his tardiness in coming forward; his conviction which bears on both his credibility as a witness and his motive to testify against the interests of the government; the convenient way in which he structures his present testimony to avoid categorical contradiction of his prior testimony; and last, but not least, the utter absurdity of such a conversation under the circumstances. It is utterly inconceivable to believe that Agent O'Brien, while under indictment for an unrelated perjury charge of which he was later acquitted, and knowing that Cassino had just been convicted and was facing a prison sentence, would admit to Cassino that he had committed perjury upon the suppression hearing and trial before this court.

Similarly, Cassino's testimony as to Investigator Kayner's statement that "not only O'Brien but others knew about it," is just as incredible. On cross-examination, it was not mentioned except as a gratuitous afterthought and was apparently a statement made in the context of a suspicion by Kayner that O'Brien had "leaked" information to Simmons' lawyer. In any event, for the reasons already stated, we reject Cassino's testimony to

the extent that it attempts to create some basis for finding that O'Brien or any of the other federal agents had knowledge of the wiretaps in August and September 1968.

II. Hart's Testimony

Former BNDD Agent Dennis J. Hart testified that in August and September 1968, he was assigned to work on the Dalli investigation. Special Agents Halpin and O'Brien were his supervisors. Hart described his work as mainly surveillance of the Beautee Trail. He testified that on August 21, 1968, he was told by O'Brien that the state police had a wiretap on the Beautee Trail and was instructed not to tell the younger agents about it. He claimed to be able to place the date by referring to his notes, which in fact contain no reference to any such conversation.[9] Hart then quickly changed his testimony to include Agent Halpin in this conversation, and, shortly thereafter, testified that in fact O'Brien did not mention the state police during this August 21, 1968 conversation but did so later during an August 28, 1968 conversation.[10]

Hart also testified that O'Brien gave him information from the wiretap to assist in surveillance.

According to Hart, on one occasion on September 6 or 7, 1968, O'Brien told Hart and other agents: "Don't worry about anything. We will know when somebody is going to move."[11] Hart testified that on another occasion, he and other agents were assigned to conduct surveillance with the state police, but he could not remember the name of the trooper working with him; nor could he remember ever seeing that trooper before or since.[12]

Hart testified that on September 7 or 8, 1968, he was conducting surveillance of Dalli's apartment in the Bronx and was told by O'Brien that there was a wire "in the apartment or around the apartment." Hart also testified that immediately prior to his testifying at Dalli's trial in May 1969, he was told by O'Brien in the presence of Investigator Kayner and Special Agents O'Neill, Finnerty and Mosher not to mention the wiretap.[13]

On cross-examination, it was revealed that Hart was discharged from federal service after he was indicted in the Eastern District of New York for extorting money from narcotics violators. Hart's first trial, in November 1970, resulted in a mistrial, and

the government finally dismissed the charges against him during a second trial.[14] It was only after his discharge from federal service, after his indictment, two trials and dismissal of the charges against him, that Hart first mentioned these facts concerning his knowledge of the wiretap. He gave this information to a private investigator, employed by petitioner Dalli, in November 1973 and signed an affidavit as to these facts on January 24, 1974. Hart testified on cross-examination that he was paid a total of $1,300 by the investigator. However, all payments were in cash so that no records of the exact amount actually exist.[15]

On cross-examination, as to Special Agent Halpin's having told Hart not to mention the wiretap to any of the "junior agents," Hart was able to name only one agent who was junior to him, who had worked in the investigation.[16] In fact, Hart was one of the least experienced agents working on this case.

We find Hart's testimony, to the effect that Agents O'Brien and Halpin told him that they knew about the wiretaps and that he should not tell junior agents, completely perjurious. Similarly, we find his entire

testimony, to the extent that he or any of the other agents received information from the state wiretaps, untrue. The factors leading to that conclusion include: Hart's tardiness in coming forward; his failure to include any of these statements which he claimed he considered non-incriminatory in any contemporaneous reports; his motive to testify falsely because of his discharge from federal service and because of his apparent need for money which was paid to him in cash; his demeanor as a witness;[17] and the logical inconsistency of telling Hart not to mention the wiretaps to junior agents when Hart was one of the most junior of the agents involved in the investigation.

III. The Testimony of Rock and O'Neill and Kayner's Affidavit

Our findings as to the incredibility of the testimony of Cassino and Hart is reinforced by other testimony offered by petitioners during the hearing, that is, the testimony of State Police Investigator Alexander Rock and Special Agent John O'Neill and by the affidavit of State Police Investigator Edward Kayner.

Investigator Rock was working under Cassino's command, and in August 1968 first became involved in the

investigation of the Beautee Trail when he was ordered by Cassino to obtain an order permitting a wiretap for the Beautee Trail. Rock testified that the information he included in the applying affidavit was based on his own observations, on information obtained from other state police investigators, and from discussions with Special Agent O'Brien and O'Brien's informant. Rock testified that as a general matter there was an exchange of information between the state police and the BNDD on narcotics investigations. Rock further testified that he knew that BNDD agents were conducting an investigation of Dalli which involved surveillance of the Beautee Trail, but that he did not know they were specifically investigating the Beautee Trail.

Rock also testified that he had some discussions with the federal agents concerning what they were doing but that he had been specifically instructed by Cassino not to give any information from any of the three wiretaps utilized in this investigation to anyone in the federal government. Rock testified that he in fact gave no such information to the federal agents.[18]

Agent John O'Neill testified that he was one of the BNDD agents assigned to the Dalli case in August and

September 1968. Agent O'Neill could not recall O'Brien's ever having told him about any upcoming events. O'Neill could not recall any statements which would suggest that O'Brien had some advance notice of what would occur.[19]

State Police Investigator Edward W. Kayner, the individual who, according to Cassino and Hart, was turning over to BNDD information from the wiretaps, submitted an affidavit as part of the government's original answering papers. In that affidavit, Kayner swears that he did not turn over to Agent O'Brien or any other BNDD agent any information obtained from the wiretap.

IV. Conclusion

We find that the testimony of Cassino and Hart, to the effect that Special Agent O'Brien or any of the other federal agents received information from the state police wiretap, is incredible. We further find, based on the testimony of O'Brien, Halpin and Cassino at the original hearing in May 1969, the testimony of Rock and O'Neill at the recent hearing, and Kayner's affidavit, that the federal agents engaged in this investigation did not receive any information from the state wiretaps.

Accordingly, petitioners' application to vacate their sentences is denied in all respects.

So ordered.

Dated: Auburn, N. Y.
June 13, 1975

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

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FOOTNOTES

1 That statute had been recently revised to meet the constitutional standards for electronic surveillance taught by the Supreme Court in Katz v. United States, 389 U.S. 347 (1967), and cases there cited. Thus, the warrants and renewals were strictly limited to wiretapping telephones listed to Beautee Trail Hair Stylists, Inc. and to Ronald J. Carr and had been issued initially on August 5, 1968 by Mr. Justice Miles F. McDonald of the Supreme Court of the State of New York, Second Judicial District. The application for the warrants was supported by a detailed affidavit which informed the Justice of the particular need for such wiretaps, the specific basis on which they were to proceed, and the precise intrusion which they would entail.

2 There is no claim that the United States Attorney or his assistant knowingly used perjured testimony.

3 Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969); Sanders v. United States, 373 U.S. 1, 9 (1963); Thornton v. United States, 368 F.2d 822, 823 (D.C. Cir. 1966) (dissenting opinion of Wright, J.).

4 Dalli v. United States, 491 F.2d 758 (2d Cir. 1974).

5 The burden of proof upon a hearing under 28 U.S.C. § 2255 is on the petitioner. Williams v. United States, 481 F.2d 339 (2d Cir.), cert. denied, 414 U.S. 1010 (1973); Papalia v. United States, 333 F.2d

620 (2d Cir.), cert. denied, 379 U.S. 838 (1964); Catalano v. United States, 311 F.2d 186 (2d Cir. 1962). Cf., Sanders v. United States, supra.

6 Hearing Transcript, p. 257-h (hereinafter "Tr.").

7 Cassino admitted on cross-examination that he did not infer from these observations that Kayner was giving O'Brien information from the wiretaps. Tr. 327. See also Tr. 257-1.

8 Tr. 310-311.

9 Tr. 128-129, 186; Dalli Exhibit 10.

10 Tr. 132-133.

11 Tr. 134-135.

12 Tr. 136-138.

13 Tr. 139-140, 144.

14 Tr. 187-188.

15 Tr. 163-175, 177.

16 Tr. 189-192.

17 This factor is particularly important with regard to Hart's testimony. Hart displayed a great deal of nervousness when he was questioned both on direct and cross-examination as to the statements made to him by O'Brien and Halpin and when he was questioned as to the money paid to him by petitioner Dalli's investigator. This included noticeable perspiration, a higher tone of voice, and fidgeting in the witness chair. All of this has even greater significance since Hart, as a former agent, had testified before, and when questioned on less crucial subjects during his testimony on this hearing appeared perfectly normal.

18 Tr. 366, 425-426, 430-431, 508.

19 Tr. 537-538, 541-542.

Stanley SIMMONS, Petitioner,
v.
UNITED STATES of America, Respondent.
Barthelmio DALLI, Petitioner,
v.
UNITED STATES of America, Respondent.
Nos. 72-CV-520, 72-CV-521.

United States District Court, N. D. New York.
Feb. 22, 1973.

Applications were made for postconviction relief. The District Court, MacMahon, J., held, inter alia, that affidavit of former state police officer, currently imprisoned on racketeering and conspiracy convictions, that he had learned from someone else that information secured by state police from wiretaps on unknown telephones had been conveyed to federal officers, leading to arrest of defendants and seizure of narcotics from their automobile, was hearsay too unsubstantial to require hearing or to support applications for postconviction relief, especially where such hearsay was contradicted by, inter alia, sworn testimony of the former officer at suppression hearing, papers submitted by defendants in support of motion to suppress, testimony of federal agents, and affidavit of official accused of revealing the information to federal officers.

Application denied.

1. Criminal Law ⇨997.7

Insofar as affidavit in support of application for postconviction relief rehashed claims raised, considered and rejected on the merits at suppression hearing, such claims could not be raised again on postconviction application. 28 U.S.C.A. § 2255.

2. Criminal Law ⇨997.15(4), 997.16(3)

Affidavit of former state police officer, currently imprisoned on racketeering and conspiracy convictions, that he had learned from someone else that information secured by state police from wiretaps on unknown telephones had been conveyed to federal officers, leading to arrest of defendants and seizure of narcotics from their automobile, was hearsay too unsubstantial to require hearing or to support applications for postconviction relief, especially where such hearsay was contradicted by, inter alia, sworn testimony of the former officer at suppression hearing, papers submitted by defendants in support of motion to suppress, testimony of federal agents, and affidavit of official accused of revealing the information to federal officers. 28 U.S.C.A. § 2255; Code Cr. Proc.N.Y. §§ 814-825.

3. Criminal Law ⇨394.6(5)

A second hearing of motion to suppress evidence is not warranted unless there is substantial and credible allegation of newly discovered evidence.

4. Criminal Law ⇨997.16(3)

Failure of defendants, at time of suppression hearing based on contention that arrest and search incident thereto resulted from certain state wiretaps, to seek evidence of wiretaps on their home telephones constituted lack of due diligence and inexcusable neglect, and in absence of any showing of justifiable reason or previous inability to seek and obtain evidence of wiretaps on their home phones, allegation that such a wiretap resulted in information which led to arrest and to seizure of narcotics did not warrant hearing or require postconviction relief. 28 U.S.C.A. § 2255.

5. Criminal Law ⇨273.4(1)

A guilty plea, voluntarily and knowingly made, constitutes a waiver of all nonjurisdictional defenses and defects in proceedings up to that point.

6. Criminal Law ⇨273.4(2)

Conviction and sentence which follow a plea of guilty are based solely and entirely on the plea, and a defendant who pleads guilty, therefore, is foreclosed from attacking his conviction collat-

erally on grounds of evidence resulting from illegal arrest or unlawful search and seizure. 28 U.S.C.A. § 2255.

7. Criminal Law ⇨273.4(2)

Where defendant, fully aware of allegations of illegal search and seizure resulting from wiretap, and advised by counsel of his own choosing, elected to plead guilty to count carrying a maximum sentence of ten years rather than risk conviction on counts for which codefendants had already received 20-year sentences, he thereby waived whatever rights he may otherwise have had to challenge his conviction in postconviction proceedings on ground of said wiretap. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.; 28 U.S.C.A. § 2255.

Alan Scribner, New York City, for petitioner Simmons.

Albert J. Krieger, New York City, for petitioner Dalli.

James M. Sullivan, Jr., U. S. Atty. for N. D. New York, for respondent; Paul V. French, Asst. U. S. Atty., Albany, N. Y., of counsel.

OPINION

MacMAHON, District Judge.*

These are applications for post-conviction relief, brought under 28 U.S.C. § 2255, by two convicts now in federal custody.

Petitioner Dalli was convicted by a jury, along with Thomas Pytel, on May 26, 1969, on one count of selling, receiving, and concealing five kilograms (approximately eleven pounds) of heroin, in violation of 21 U.S.C. §§ 173 and 174, and on one count of conspiracy to commit the substantive offense, in violation of 18 U.S.C. § 371. He was sentenced on June 13, 1969 to twenty years imprisonment on each of the two counts, the sentences to run concurrently.

Petitioner Simmons jumped bail after the case had been called for trial in the midst of an evidentiary hearing on defendants' motion to suppress evidence on the ground that the seizure of the heroin stemmed from wiretaps by the New York state police. He was apprehended two and a half years later, in November 1971, and, upon his plea of guilty to one substantive count of purchasing five kilograms of heroin, in violation of 26 U.S.C. § 4704(a) and 18 U.S.C. § 2, was sentenced on February 7, 1972 to ten years imprisonment and fined $20,000.

Petitioner Dalli's conviction was affirmed on appeal. United States v. Dalli, 424 F.2d 45 (2d Cir.), cert. denied, 400 U.S. 821, 91 S.Ct. 39, 27 L.Ed.2d 49 (1970). The facts of the case are fully narrated in the opinion of the Court of Appeals and familiarity with that opinion is assumed. Suffice it to say here that both petitioners, residents of New York City, were arrested and five kilograms of pure heroin were seized from their automobile on September 10, 1968, while they were returning to New York on the New York thruway after purchasing the heroin from the Canadian defendants, Pytel and Bourdeau, whom they had met at the Holiday Inn in Plattsburgh, New York.

Following the filing of the indictment in December 1968, petitioners made a number of motions, one of which sought the suppression of certain evidence, including the five kilograms of heroin, on the ground that the evidence had been seized upon an illegal arrest. The claim that the arrest was illegal was grounded on an allegation that it resulted from tainted information learned from wiretaps by the New York state police.

The motion to suppress was referred to the trial court, and when the case came on for trial on May 12, 1969, we granted a full evidentiary hearing. Following the hearing, we denied the motion to suppress and found that the search was incident to a lawful arrest based on probable cause and that neither the arrest nor the seizure was based on information tainted by wiretaps. Our

* Of the Southern District of New York, sitting by designation.

findings and conclusions were set forth in three opinions, which we append to this opinion. Familiarity with the facts set forth in those opinions will be assumed, but some repetition is necessary to intelligible consideration of the issues raised here.

All the wiretaps sought by the defendants upon the suppression hearing had been duly authorized under New York law (N.Y.Code Cr.Proc. §§ 814–825 (as of 1968)), which had been recently revised to meet the constitutional standards for electronic surveillance taught by the Supreme Court in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and cases cited therein. Thus, the warrants and renewals were strictly limited to wiretapping telephones listed to Beautee Trail Hair Stylists, Inc. and to Ronald J. Carr and had been issued initially on August 5, 1968 by Mr. Justice Miles F. McDonald of the Supreme Court of the State of New York, Second Judicial District. The application for the warrants was supported by a detailed affidavit which informed the Justice of the particular need for such wiretaps, the specific basis on which they were to proceed, and the precise intrusion which they would entail.

All of the wiretaps, recordings, and transcripts thereof, along with the warrants, renewals, and affidavits on which they were based, were produced upon the hearing and delivered to the defendants and their counsel for their inspection and selection of any wiretaps or other material which they regarded as relevant. After thorough examination of such materials by the defendant Dalli and his counsel, Richard I. Rosenkranz, Esq., the defendant Simmons and his counsel, Albert J. Krieger, Esq., now appearing for Dalli, and Robert P. Wylie, Esq., counsel for the then absent defendant Pytel, the defendants selected only one wiretap which they believed to be of any relevance.

The relevant wiretap on the telephone line of Beautee Trail Hair Stylists, Inc. intercepted a telephone conversation between Dalli and Simmons on September 7, 1968 to the effect that they would meet at 7:00 o'clock that evening. It then appeared from reports of the Federal Bureau of Narcotics and Dangerous Drugs ("Federal Bureau of Narcotics"), also made available to defendants, that federal agents had observed the 7:00 o'clock meeting.

All witnesses desired by the defendants were produced, and the defendants then called Agent John T. O'Brien of the Federal Bureau of Narcotics, in charge of the investigation of the defendants; his superior, George R. Halpin; Agent John W. Maltz, who actually made the observation of the meeting; and Lieutenant Charles Cassino of the New York state police, who was in charge of a parallel investigation of the defendants by the state police. Despite exhaustive examination of all the witnesses, the defendants failed to establish any connection between any wiretap, surveillance of any defendant, the observation of the defendants Dalli and Simmons at the 7:00 P.M. meeting, and, ultimately, the arrest and seizure of the narcotics.

Agent O'Brien testified that he did not learn any information from any wiretaps during the course of the federal investigation and that he had no knowledge of any wiretaps relating to the defendants by the New York state police until about two weeks before the suppression hearing (May 12, 1969). Halpin testified that the Federal Bureau of Narcotics had not received any information from the state police learned as a result of wiretaps or otherwise which led to the investigation and arrest of the defendants. Lieutenant Cassino of the state police testified that he did not reveal any information learned from state wiretaps to anyone connected with the Federal Bureau of Narcotics.

Petitioners Dalli and Simmons now claim that the prosecution ** knowingly used perjured testimony upon the suppression hearing in that Agent O'Brien's

** There is no claim that the United States Attorney or his assistant knowingly used perjured testimony.

testimony that he was unaware of the state wiretaps until two weeks before the suppression hearing and that he did not learn any information from any wiretaps during the course of the federal investigation was false.

The claim is based on an affidavit of now ex-Lieutenant Charles Cassino, who is presently confined to a federal penitentiary following his conviction on one count of interstate and foreign travel or transportation in aid of racketeering enterprises, in violation of 18 U.S.C. § 1952, and on one count of conspiracy to commit the substantive offense, in violation of 18 U.S.C. § 371, in the United States District Court for the Southern District of New York.

[1] Much of Cassino's affidavit is a rehash of the allegations, grounds, and claims raised, heard, argued, considered, and rejected on the merits on the suppression hearing. It would serve neither the ends of justice nor any purpose whatever to reiterate the claims or to reconsider them here. Petitioners have, thus, had their day in court on those claims and we have had "our say." They may not, therefore, raise the same claims again. Kaufman v. United States, 394 U.S. 217, 227 n. 8, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969); Sanders v. United States, 373 U.S. 1, 9, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); Thornton v. United States, 125 U.S. App.D.C. 114, 368 F.2d 822, 833 (1966) (dissenting opinion of Wright, J.).

As new matter, Cassino now avers that after the September 7 meeting between Dalli and Simmons, the state police tapped "telephone numbers presently unknown to me located at or near the residence of Dalli. . . . . It was on these telephones that an arrangement was made between Simmons and Dalli to go to upstate New York on September 10, 1968. My best recollection is that that telephone conversation took place on September 9, 1968 and was first heard by our office early in the morning hours of September 10, 1968 . . . . . Subsequent to May, 1969, I learned that it was a common practice during the course of this investigation for Investigator Kaynor [sic] to take the tapes representing the previous day's eavesdropping and together with Agent John J. O'Brien of the Bureau of Narcotics and Dangerous Drugs, go to . . . [a cubicle designed for audition of recorded telephone conversations] and there review the tapes . . . . . As far as the 10th itself is concerned, I received a call early in the morning from Investigator Kaynor [sic] who told me of this probable meeting and I ordered him to contact all necessary parties immediately as to what we suspected and what we anticipated would occur . . . . . Amongst those whom Investigator Kainor [sic] was to contact were Agents of the Bureau of Narcotics and Dangerous Drugs. The investigation and surveillance of September 10 which resulted in the arrest of Dalli and Simmons, Pytel and Bordeau, came about as a result of the orders which I gave after receiving the information from Investigator Kainor [sic] concerning the meeting between Dalli and Simmons."

[2] Cassino's averments are not only indefinite, vague, and conclusory, but insofar as he seeks to connect information learned by the state police from wiretaps on unknown telephones to the arrest of the defendants and seizure of narcotics from their automobile, his statements are blatant and inadmissible here. Plainly, information *learned* by Cassino from someone else is hearsay too unsubstantial to require a hearing or to support the instant application. This is especially so when the hearsay is contradicted not only by the files and records of this case, consisting, among other things, of the inconsistent sworn testimony of Cassino, himself, upon the suppression hearing and before he had any motive to testify falsely, but also by the papers submitted by defendants in support of the previous motion to suppress, the papers submitted by the government in opposition to that motion, the testimony of Agent O'Brien and a

other federal agents who testified upon the suppression hearing, all the wiretaps there produced, all the documentary evidence there received, and by the earlier opinions and findings of this court. Finally, it is contradicted here by the affidavit of Edward W. Kayner, the public official now accused by Cassino of revealing information learned from these unidentified wiretaps. Kayner's affidavit specifically and convincingly denies that any wiretaps existed other than those produced on the prior suppression hearing and emphatically denies that he related any information learned from any wiretaps either to Agent O'Brien or to anyone else connected with the Federal Bureau of Narcotics. See United States v. Catalano, 281 F.2d 184 (2d Cir.), cert. denied, 364 U.S. 845, 81 S.Ct. 88, 5 L.Ed.2d 69 (1960); United States v. Branch, 261 F.2d 530, 533 (2d Cir. 1958) cert. denied, 359 U.S. 993, 79 S. Ct. 1125, 3 L.Ed.2d 981 (1959); United States v. Smith, 257 F.2d 432, 434 (2d Cir. 1958), cert. denied, 359 U.S. 926, 79 S.Ct. 609, 3 L.Ed.2d 629 (1959).

The hearsay nature of Cassino's attestations, his long silence, and his guarded averment that he learned about Investigator Kayner's alleged revelations "subsequent to May, 1969," *i. e.*, after Cassino testified upon the suppression hearing, convince us that these applications for a hearing and for habeas corpus should be denied. United States v. Malcolm, 432 F.2d 809, 812 (2d Cir. 1970).

[3] These applications, in reality, seek a second hearing of the defendants' motion to suppress evidence. Such a hearing is not warranted unless there is a substantial and creditable allegation of newly discovered evidence. Townsend v. Sain, 372 U.S. 293, 313, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). No such showing is made here.

[4] If there were other wiretaps at or near Dalli's residence, which led to the arrest and seizure, obviously they were in existence at the time of the earlier hearing and it would have been just as easy to seek and obtain them as it was to seek and obtain wiretaps on the telephones of Beautee Trail Hair Stylists, Inc. and Ronald J. Carr. Surely, the most logical places for petitioners to suspect wiretaps would be upon their home telephones. If petitioners had exercised due diligence, such evidence, if it existed, would have been discovered and produced on the earlier hearing. Their failure even to seek such evidence can only be attributed to their inexcusable neglect. To find otherwise would only be to sanction needless piecemeal presentations of constitutional claims in the form of deliberate bypassing of orderly federal procedures. Petitioners make no showing of any justifiable reason or previous inability to seek and obtain such evidence if it existed. This failure alone would warrant denial of these appliations.

In addition to all of the foregoing reasons for denial of relief, there are still other reasons for denying Simmons' application.

As noted earlier, petitioner Simmons jumped bail after the action had been called for trial on May 12, 1969 and while we were conducting the hearing to suppress evidence on the ground that it had been seized as a result of information learned from wiretaps by the state police. Both Simmons and his counsel, Albert J. Krieger, had inspected the tapes of all wiretaps produced before Simmons fled, and we continued the hearing in Simmons' absence.

Some two and one-half years later, Simmons was apprehended and his case again came on for a jury trial before us, sitting by designation in the Northern District of New York, on February 7, 1972. He appeared at the appointed time, represented still by Mr. Krieger, and moved orally for a preliminary hearing on his claim that "there was illegal wire tapping in which there was federal participation, or at least the wiretapping results were transmitted to federal authorities." His counsel represented that he could establish more than just the wiretaps which had been presented upon the previous suppression hearing, that

he had information that there was at least one other wiretap on the Dalli telephone in the Bronx, that a wiretap was also installed at a public telephone at the same premises, that a conversation concerning the trip upstate was intercepted by state police and transmitted to federal officers, that the surveillance of September 10, 1968 on the thruway and at the Holiday Inn in Plattsburgh took place because of illegal eavesdropping, and that there was also illegal eavesdropping at the Holiday Inn in Plattsburgh. In short, Simmons put forward the same vague allegations now made in the affidavit of ex-Lieutenant Cassino, who was present in court in response to a defense subpoena at the time of the oral motion to suppress. Mr. Krieger represented that Lieutenant Cassino "has had some personal problems of his own and is no longer with the State Police, but he is here prepared to testify" and that accordingly the defendant Simmons would be prepared to proceed preliminarily with the wiretap hearing.

We denied the application for a hearing without prejudice to a proper written application, supported by affidavits, although it appeared on oral argument that the defendant Simmons was quite clearly bound by our denial of the motion to suppress evidence because he had waived his right to be present by absconding during the hearing. Diaz v. United States, 223 U.S. 442, 453–459, 32 S.Ct. 250, 56 L.Ed. 500 (1912); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied sub nom. Roberts v. United States, 401 U.S. 925, 91 S.Ct. 884, 27 L.Ed.2d 828 (1971); United States v. Dalli, *supra*, 424 F.2d at 48; Glouser v. United States, 296 F.2d 853 (8th Cir. 1961), cert. denied, 369 U.S. 825, 82 S.Ct. 840, 7 L.Ed.2d 789 (1962); Burley v. United States, 295 F.2d 317 (10th Cir. 1961). We then proceeded to empanel a jury.

After the jury was empanelled, we took a short recess and, upon returning to the courtroom, Mr. Krieger advised that he had discussed the possibility of a disposition with his client, Simmons. Mr. Krieger advised that he had presented Simmons with a written acknowledgment of advice as to his constitutional rights and that Simmons was disposed to enter a plea of guilty to count five of the indictment, which alleged a violation of 26 U.S.C. § 4704(a) and 18 U.S.C. § 2. That count carried a maximum penalty of ten years imprisonment and a fine of $20,000. The defendant then, with the court's permission, withdrew his plea of not guilty and offered to plead guilty to count five. Count five was read to the defendant and he pleaded guilty.

The court then addressed Simmons personally, advised him of his constitutional rights, and interrogated him in full compliance with Rule 11, Fed.R.Crim.P. Simmons acknowledged that he was making his plea freely and voluntarily, after consultation with his counsel, with a full understanding of the nature of the charge and the consequences of his plea. He assured us that he was pleading guilty because he was guilty and for no other reason. We then elicited a factual basis for his plea by his confession in open court that he went to Plattsburgh with Dalli on September 10, 1968 and purchased five kilograms of heroin from Pytel and Bourdeau, and that he did so intentionally, with full knowledge that there was no tax stamp on the package.

The court also elicited from Simmons' counsel, Mr. Krieger, that he had fully advised Simmons of his rights and of any defense that he might have and that he was satisfied that Simmons was pleading guilty to count five freely and voluntarily because he was guilty and for no other reason. We then accepted Simmons' plea of guilty to count five and thereafter sentenced him to a term of ten years imprisonment and fined him $20,000.

[5, 6] It is well settled that a guilty plea, voluntarily and knowingly made, constitutes a waiver of all nonjurisdictional defenses and defects in proceedings up to that point. Moore v. United

States, 425 F.2d 1290 (5th Cir.), cert. denied, 400 U.S. 846, 91 S.Ct. 91, 27 L.Ed.2d 83 (1970). The conviction and sentence which follow a plea of guilty are based solely and entirely upon the plea and not upon any evidence which may have been acquired by an unlawful search and seizure. A defendant who pleads guilty, therefore, is foreclosed from attacking his conviction collaterally under 28 U.S.C. § 2255 on grounds of an illegal arrest or unlawful search and seizure. Kaufman v. United States, *supra*; Hoffman v. United States, 327 F.2d 489 (9th Cir. 1964); Smith v. United States, 296 F.2d 220 (6th Cir. 1961), cert. denied, 369 U.S. 876, 82 S.Ct. 1147, 8 L.Ed.2d 279 (1962); United States v. Zavada, 291 F.2d 189, 191 (6th Cir. 1961); Swepston v. United States, 289 F.2d 166, 169 (8th Cir. 1961), cert. denied, 369 U.S. 812, 82 S.Ct. 689, 7 L.Ed.2d 612 (1962); United States v. Salzano, 241 F.2d 849 (2d Cir. 1957).

[7] Wholly apart from the usual rule, it is plain here that the defendant Simmons, fully aware of the allegations now made by Cassino and advised by counsel of his own choosing of all defenses that he might have had, including the alleged other wiretapping now advanced, elected to plead guilty to a tax count carrying a maximum prison sentence of ten years rather than risk imminent conviction on the conspiracy and substantive counts carrying a maximum prison sentence of twenty years, which had already been imposed on his co-defendants after conviction by a jury. Thus, with full knowledge of all the facts, he made a free and intelligent choice to plead guilty and to abandon his claims of illegal arrest and unlawful search and seizure. We, therefore, find that he waived whatever rights he might otherwise have had to challenge his conviction on the grounds now asserted. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

In view of the above findings of fact and conclusions of law, we find it unnecessary to decide whether the federal law enforcement officers may use information, assuming, *arguendo*, that it was learned from unknown wiretaps by state officers in accordance with state law.

Accordingly, the applications of the petitioners Dalli and Simmons for vacation of their convictions and sentences are in all respects denied.

So ordered.

APPENDIX A

MacMAHON, District Judge.

All four defendants moved before trial, pursuant to Rule 41(e), Fed.R.Crim.P., to suppress evidence seized from them at the time of their arrests. The motions were referred to the trial judge. All defendants contend that the warrantless searches and arrests were without probable cause and, therefore, a violation of their Fourth Amendment rights. Following an extensive evidentiary hearing, we denied the motions from the bench and stated that we would later make detailed findings of fact and conclusions of law. We now specify the findings of fact and conclusions of law supporting our decision.

The question presented is whether the searches were incident to lawful arrests. The answer turns on whether the agents had probable cause "to support a belief . . . that . . . [the defendants were] engaged in criminal activity" at the time of the arrests. Beck v. Ohio, 379 U.S. 89, 95, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964).

In determining probable cause, all the information in the agent's possession, his personal observations, information obtained from the Bureau of Narcotics' records or from other agents, and information from informers of proven reliability must all be considered. Carroll v. United States, 267 U.S. 132, 161–162, 45 S.Ct. 280, 69 L.Ed. 543 (1924); Jones v. United States, 106 U.S.App.D.C. 228, 271 F.2d 494 (1959), cert. denied, 362 U.S. 944, 80 S.Ct. 809, 4 L.Ed.2d 771 (1960); United States v. Kanceso, 252 F.2d 220 (2d Cir. 1958).

We find that the agents of the Bureau of Narcotics, participating in the investigation and surveillance leading to these arrests, were in constant intercommunication with each other, and that the agents at the time of the arrests knew the following facts.

Narcotics agents, on a tip from an informer of known reliability, McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), that there was trafficking in narcotics at the Beautee Trail Beauty Parlor in Brooklyn, New York, put the place under surveillance in August 1968.

Dalli, one of the defendants, was observed entering and leaving the Beauty Parlor on a number of occasions. Records of the New York Telephone Company showed that Dalli, from May 20 to August 4, 1968, had placed a number of telephone calls to the phone number of Thomas Pytel. Pytel lived in Montreal and was known by the Canadian police to be associated with persons engaged in smuggling heroin, particularly with Giuseppe Cotroni, a well-known Canadian source of supply for the American narcotics market. See United States v. Bentvena, 319 F.2d 916, 921–926 (2d Cir.), cert. denied, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963). It is a matter of general knowledge among those familiar with the importation of narcotics into the United States, and we judicially notice the fact, that large amounts of heroin are transported from Montreal to New York City along the Northway-New York Thruway route. *Cf.*, Carroll v. United States, *supra*, 267 U.S. at 170, 45 S.Ct. 280.

Dalli was placed under continuous surveillance. In early September 1968, Dalli was observed in Brooklyn meeting with Stanley Simmons, a man known to the Bureau as a suspected heroin supplier. A few days later, on September 10, Dalli once again met Simmons and they proceeded in a 1967 Cadillac to drive north on the New York Thruway. Narcotics agents were in close pursuit.

The Cadillac pulled into the parking lot of the Holiday Inn motel in Plattsburgh, New York, at 3:30 P.M. on September 10. Simmons and Dalli got out of the car and entered the motel. They were overheard at the desk using a fictitious name, "Forbes," and were given Room 243. The agents placed the entire area under surveillance and exchanged information regarding the movements of Dalli and Simmons, and later Pytel and Bourdeau, by using car radios and walkie-talkies.

Simmons and Dalli remained in their rooms until 7:00 P.M., when Simmons came into the lot, took a blue suitcase out of the Cadillac and carried it into the motel.

Approximately half an hour later, at 7:30 P.M., Pytel drove his Buick automobile bearing Quebec license plates into the parking lot and pulled next to a 1964 Chevrolet convertible occupied by Bourdeau. At the same time, Dalli and Simmons came out of the Holiday Inn and began walking around the parking lot, looking into car windows and very carefully "casing" the surrounding area. After ten minutes of this, they re-entered the motel.

Bourdeau then pulled away and drove to the Howard Johnson's Motor Lodge, situated a short distance from the Holiday Inn. Bourdeau was observed leaving the Howard Johnson's parking lot carrying a black suitcase. He returned to the Holiday Inn parking lot and handed Pytel the black suitcase. Pytel, in turn, carried the suitcase into the motel, where he was observed entering, and later waving from the window of Room 243. Bourdeau then circled the lot twice, left his car, entered the motel, remained inside for no more than a minute, and returned to his car.

A short while later, Pytel left Holiday Inn carrying something hidden under a raincoat which he carried over his arm. He walked over and sat in Bourdeau's car. Pytel was observed handing Bourdeau something that appeared to be money which he had taken out of a brown paper bag. Bourdeau proceeded to count the money. When Bourdeau

Accordingly, the defendants' motions to suppress the evidence seized at the time of their arrests is denied.

So ordered.

Dated: May 19, 1969.

APPENDIX B

TRANSCRIPT OF ORAL OPINION OF THE COURT, DELIVERED ON MAY 20, 1969 UPON THE CONCLUSION OF THE HEARING TO SUPPRESS EVIDENCE. [SEE TRIAL TRANSCRIPT, pp. 279-282.]

THE COURT: I deny the motion to suppress evidence on a finding that there is no showing that there was any evidence obtained by the Federal government as a result of electronic surveillance or wiretaps of any communication, of any such tainted evidence from the State Police that did have some wiretaps to any officer or agent of the Federal government. At most, the evidence shows only that the State and Federal authorities, specifically the New York State office of the Bureau of Narcotics and the New York office of the State Police were investigating—were engaged in a joint investigation of a murder, of two murders, a double murder, Tuminaro and Gangi, both of whom were known to be traffickers in narcotics. There is no showing at all that any evidence or any leads to relevant evidence relating to this case or the investigation of this case were derived from such tainted sources, if they be tainted.

On the contrary, the evidence shows that long before this double murder, long before any joint efforts of the Bureau of Narcotics and the State Police relevant to those murders were even undertaken, the Federal Bureau of Narcotics did have the Beautee Trail beauty parlor under investigation, under surveillance, and had seen the defendant Dalli frequenting the place; that they did so on a tip from an informer; that they had also obtained independently of any information from the State Police listings of telephone tolls by Dalli to Pytel in Montreal; that they knew from their own records that Pytel was a known associate of people suspected of dealing in narcotics by the Montreal police. They also knew that the Thruway was the favorite pipeline, as many cases in the books will reveal, for the importation of narcotics from Montreal to New York.

The surveillance of the Beautee Trail seems to me to have been independently based on the facts known to the Bureau from untainted sources developed independently of any cooperation with the State Police.

I therefore find that there is no evidence shown here in this hearing, despite exhaustive inquiry by counsel for the defense, of any tainted source of any evidence.

These will suffice for my findings at the present, and the Court may on more thorough review of the evidence make further and more detailed findings, once the Court is in possession of the transcript.

I am confident, however, that such details would only further support my conclusion that there was no tainted evidence obtained here by the Federal authorities.

There is also a question whether even if it were, whether the State wiretap may have been perfectly legal. We may not even reach that question, however.

Well now, proceed.

I deny the motion to suppress.

APPENDIX C

MacMAHON, District Judge.

Defendants Dalli and Pytel moved, pursuant to Rule 41(e), Fed.R.Crim.P., to suppress evidence allegedly obtained from illegal wiretaps. During the trial and following an evidentiary hearing, we denied the motion and stated that we would later make more detailed findings of fact and conclusions of law. We now specify the findings of fact and conclusions of law supporting our decision

The Bureau of Narcotics and Dangerous Drugs, the federal agency in charge of the investigation that led to the arrests of these defendants, conducted no electronic or wire interceptions of any kind. The New York State Police, however, admitted having conducted wiretaps of the telephones located at the Beautee Trail Beauty Parlor in Brooklyn, New York. They also admitted that some of the intercepted conversations might have involved the defendants Dalli and Simmons.

Pursuant to our direction, the New York State Police, on May 12, 1969, turned over to the defense all records and transcripts of wiretaps involving the beauty parlor's telephones. Counsel for all four defendants, and the defendants Dalli and Simmons themselves, exhaustively searched these records and selected a number of tapes of conversations which they claimed involved them.

After a one-week interruption due to Simmons' flight and Pytel's inability to cross the Canadian border without proper authorization, on May 19, 1969, Dalli and Pytel, the present movants, along with their respective counsel, listened to all the tapes which they had requested. After listening to all of them, they selected only one tape which they claim was related to the Bureau of Narcotics' investigation in this case.

The tape selected was the interception of a conversation between Simmons and Dalli on September 7, 1968, in which they agreed to meet in Brooklyn at 7:00 P.M. on that same day. They met at the appointed time and were observed by the agents. The defense claims that the State Police informed the agents in advance of the proposed meeting and that the agents' surveillance of the meeting and any evidence obtained thereby is tainted by the wiretap.

The agents also observed Dalli's arrival at Kennedy Airport on September 5, 1968. The defendants claim that the agents received information in advance of the meeting from the State Police. As to this claim, however, defendants point to no intercepted conversation which contained the slightest hint of Dalli's expected arrival or any other information which would lead the State Police to know that Dalli would arrive at the airport on September 5, 1968 or any other time. We, therefore, find that no such information taints the agents' observations of Dalli's arrival.

The New York State Police and the Bureau of Narcotics were conducting simultaneous but separate and independent investigations that happened to involve the Beautee Trail Beauty Parlor. The State Police was investigating the Tuminaro-Gangi double murder, and the Bureau of Narcotics an informer's tip that the beauty parlor was a "front" for drug traffic.

All witnesses requested by the defendants were produced. The agents called by the defense, as well as Lieutenant Cassino of the New York State Police, testified that no information concerning these defendants, either obtained through wiretaps or any other means, was communicated by the New York State Police to the Bureau of Narcotics. The only communication between the two agencies was a routine liaison meeting between Lieutenant Cassino and Agent Halpin in mid-August 1968, and although they discussed, along with a number of other matters, the concurrent investigation of the beauty parlor, there was no discussion of any of the four defendants charged in this indictment or of any information the State Police might have obtained through wiretaps. This one and only contact was well before the September 7 conversation between Simmons and Dalli.

There is no evidence that the agents' surveillance of either Dalli's arrival on September 5 or the Dalli-Simmons meeting on September 7 was based on information obtained from the New York State Police.[1] On the other hand, there

1. United States v. Bentvena, 319 F.2d 916, 946 (2d Cir.), cert. denied, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963).

is a great deal of evidence offering a plausible explanation, other than wiretap information, for the agents' presence at the two incidents.

The Bureau had been conducting a surveillance of the beauty parlor since May 1968 because of a tip from an informer of known reliability that the place was being used for the sale of narcotics. The agents observed Dalli frequenting the beauty parlor, and a check of his telephone toll slips disclosed that he had made telephone calls to a Canadian, Thomas Pytel, a man known to the Canadian police as an associate of the Cotroni mob, notorious narcotics dealers operating in Montreal.[2]

The Bureau placed Dalli under surveillance. When he left the United States in late August 1968, the agents kept a watch on his house and would often follow his wife. This surveillance of Dalli's wife, and not information from the State Police, led the agents to Kennedy Airport on September 5, where they observed Dalli's arrival.

The agents were similarly, led to the September 7 Simmons-Dalli meeting because of the twenty-four hour surveillance of Dalli which began immediately upon his arrival on September 5.

The Fourth Amendment "excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an 'independent source'." [3] We find that the agents' observations on the two occasions pointed to by the defense, and in fact on all other occasions relevant to this case, were the product of their own independent investigation and surveillance and were in no way based on or tainted by information obtained, directly or indirectly, from State Police wiretaps or any other illegal means.

We, therefore, conclude that there is no violation of the defendants' rights under the Fourth Amendment or under the Federal Communications Act.

Since we have decided that the State Police wiretap information was not disclosed to the Bureau and does not constitute evidence or a link in the chain of evidence, it is unnecessary for us to decide the legality of the wiretaps under the new state and federal standards.

Accordingly, defendants' motion to suppress is denied.

So ordered.

Dated: June 13, 1969.

2. United States v. Bentvena, *supra*, 319 F.2d at 921-926.

3. Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920).

Barthelmio DALLI, Appellant,
v.
UNITED STATES of America, Appellee.
No. 47, Docket 73-1536.

United States Court of Appeals, Second Circuit.
Argued Oct. 24, 1973.
Decided Jan. 14, 1974.

Petition for postconviction relief filed after conviction of selling, receiving and concealing heroin. The United States District Court for the Northern District of New York, Lloyd F. MacMahon, J., denied the petition without a hearing, 354 F.Supp. 1383, and petitioner appealed. The Court of Appeals, Mansfield, Circuit Judge, held that the trial court had not abused its discretion in dismissing the petition when the affidavit upon which it was based consisted mostly of evidence already received and considered in a prior suppression hearing and where the alleged "newly discovered" evidence contained in the affidavit was vague, indefinite, conclusory and marbled with hearsay.

Affirmed.

1. Criminal Law ⇐997.15(1)

Court is within discretion in denying petition for postconviction relief when supporting affidavit is insufficient on its face to warrant hearing. 28 U.S.C.A. § 2255.

2. Criminal Law ⇐997.16(2)

In making threshold determination whether to grant hearing on petition for postconviction relief, court looks primarily to affidavit or other evidence proffered in support of application in order to determine whether, if evidence should be offered at hearing, it would be admissible proof entitling petitioner to relief. 28 U.S.C.A. § 2255.

3. Criminal Law ⇐997.16(2)

Mere generalities or hearsay statements will not normally entitle applicant to hearing on petition for postconviction relief since such hearsay would be inadmissible at hearing itself, and petitioner must instead set forth specific facts which he is in position to establish by competent evidence. 28 U.S.C.A. § 2255.

4. Criminal Law ⇐997.16(2)

Where petitioner for postconviction relief has already had full evidentiary hearing upon the same claim and seeks another hearing on grounds of newly discovered evidence, greater specificity is required than if no hearing had been held. 28 U.S.C.A. § 2255.

5. Criminal Law ⇐997.16(3)

Trial court did not abuse discretion in dismissing petition for postconviction relief without hearing where affidavit in support of petition, which alleged that petitioner's conviction of selling, receiving and concealing heroin had been obtained through use of illegal wiretaps, was vague, indefinite, conclusory and marbled with hearsay, and where most of evidence alluded to in affidavit had already been presented at prior suppression hearing. 18 U.S.C.A. §§ 371, 1952; 28 U.S.C.A. § 2255; Narcotic Drugs Import and Export Act, § 2(b-d, f), 42 Stat. 596 as amended.

6. Criminal Law ⇐997.15(1)

Although opposing affidavits from government cannot be deemed part of records and files of case for purpose of showing that petitioner is not entitled to postconviction relief, they may be con-

sidered in assessing sufficiency of petitioner's supporting affidavit. 28 U.S.C.A. § 2255.

7. Criminal Law ⊂=997.16(7)

Although fact that former policeman's conviction of aiding racketeering enterprise and policeman's long silence on wiretapping allegedly leading to petitioner's conviction of selling, receiving and concealing heroin would not, standing alone, justify denial of hearing on petition for postconviction relief, trial court was entitled to take those circumstances into consideration in deciding whether evidence requiring hearing had been stated in affidavit in support of petition. 28 U.S.C.A. § 2255.

Albert J. Krieg[illegible] New York City (Alan Scribner, New York City, of counsel), for appellant.

Paul V. French, Asst. U. S. Atty. (James M. Sullivan, Jr., U. S. Atty., N. D. N. Y., Syracuse, N. Y., of counsel), for appellee.

Before SMITH, MANSFIELD and OAKES, Circuit Judges.

MANSFIELD, Circuit Judge:

After a jury trial before Judge MacMahon Barthelmio Dalli was on May 26, 1969, convicted of selling, receiving and concealing heroin, 21 U.S.C. §§ 173 and 174, and of conspiracy to commit the same, 18 U.S.C. § 371. He was sentenced to concurrent terms of 20 years on each of two counts. The conviction was affirmed by this court. United States v. Dalli, 424 F.2d 45 (2d Cir.), cert. denied, 400 U.S. 821, 91 S.Ct. 39, 27 L.Ed.2d 49 (1970). In November 1972 Dalli filed a petition pursuant to 28 U.S.C. § 2255 alleging that the evidence admitted at his trial was tainted by illegal wiretap activities of the New York state police. In support of his petition Dalli introduced an affidavit from a former New York state police lieutenant who had supervised the alleged wiretapping. On the basis of the motion papers and the files and records of the case, Judge MacMahon denied the motion without a hearing. In view of the deficiencies of the supporting affidavit we affirm.

Appellant's § 2255 petition seeks in effect to reopen an issue raised and resolved against him after a pretrial suppression hearing in May 1969. Prior to appellant's trial a full evidentiary hearing was held to determine whether his arrest and the heroin found in his possession at the time of arrest were the fruits of an allegedly illegal state wiretap. The federal government maintained that its investigation and arrest of the appellant were independent of any state investigation or wiretap. Federal agents testified that their interest in appellant was sparked by his frequent visits to the Beauty Trail Hair Parlor, reputedly an emporium for narcotics, located in Brooklyn. Their observations prompted them to check appellant's telephone record, which disclosed several calls to Thomas Pytel, a man suspected by Canadian authorities to be trafficking in narcotics. Further surveillance of appellant revealed a meeting on September 7, 1968, between appellant and Stanley Simmons, likewise a suspected dealer in narcotics. Several days later federal agents followed appellant and Simmons to a Plattsburg, New York, motel where the two met with Pytel and a Canadian associate to transact some business in narcotics. Dalli and Simmons were arrested shortly after leaving the motel with 11 pounds of heroin in their possession.

At the 1969 pretrial suppression hearing it was disclosed that the New York state police had, pursuant to a New York state court order, been wiretapping the Beauty Trail Hair Parlor during August and September 1968.[1] The government produced the wiretaps and transcripts thereof for inspection by appel-

1. As part of the same effort the home telephone of Ronald Carr, owner of the beauty parlor, was tapped.

lant. Dalli and his co-defendants seized upon only one call as evidence of taint. The call was between Dalli and Simmons, made from the telephone at the Beauty Trail Hair Parlor, in which the two agreed to meet on the evening of September 7, 1968. This was the meeting watched by the federal agents, which occurred several days prior to Dalli's arrest. The agents, however, testified that they had received no information concerning the September 7th meeting from the state police, that their knowledge of the meeting and their ultimate arrest of appellant resulted solely from their 24-hour surveillance of appellant, and that they did not learn of the wiretaps until much later, shortly before the 1969 hearing. Supporting their version of the case was the testimony of Charles Cassino, then a New York state police lieutenant in charge of the Beauty Trail Hair Parlor wiretaps. Cassino testified that he had passed no wiretap information to the federal agents; indeed, he professed ignorance of the fact that Dalli had spoken with Simmons on an intercepted call. On the basis of this testimony the district court concluded that the federal investigation and arrest of Dalli stood untainted by the state wiretap activities. Thereupon Dalli was tried and convicted.

Three and one half years after his conviction Dalli sought by the present § 2255 petition to overturn the earlier finding that his conviction was untainted, or at least to re-argue its merits, largely on the basis of an affidavit from former lieutenant Cassino.[2] Judge MacMahon, who had presided at the 1969 suppression hearing and trial, dismissed the present petition without an evidentiary hearing. Appellant here urges that it was error to have denied him a hearing. We disagree.

[1-4] As a recent pronouncement indicates, this court takes a dim view of any summary rejection of a petition for postconviction relief when supported by a "*sufficient* affidavit." See Taylor v. United States, 487 F.2d 307 (2d Cir. Nov. 14, 1973). But we have, consistently with that pronouncement, recognized that a judge is well within his discretion in denying a petition when the supporting affidavit is insufficient on its face to warrant a hearing. See Accardi v. United States, 379 F.2d 312 (2d Cir. 1967); Mirra v. United States, 379 F.2d 782 (2d Cir. 1967). Section 2255 requires a hearing to resolve disputed issues of fact "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." See Fontaine v. United States, 411 U.S. 213, 215, 93 S.Ct. 1461, 1462, 36 L.Ed.2d 169 (1973). In making that threshold determination the court looks primarily to the affidavit or other evidence proffered in support of the application in order to determine whether, if the evidence should be offered at a hearing, it would be admissible proof entitling the petitioner to relief. Mere generalities or hearsay statements will not normally entitle the applicant to a hearing, D'Ercole v. United States, 361 F.2d 211, 212 (2d Cir.), cert. denied, 385 U.S. 895, 87 S.Ct. 610, 17 L.Ed.2d 454 (1966), rehearing denied, 385 U.S. 1032, 87 S.Ct. 758, 17 L.Ed.2d 680 (1967); United States v. Catalano, 281 F.2d 184 (2d Cir.), cert. denied, 364 U.S. 845, 81 S.Ct. 88, 5 L.Ed.2d 69 (1960); Paroutian v. United States, 395 F.2d 673, 674 (2d Cir. 1968), cert. denied, 393 U.S. 1058, 89 S.Ct. 700, 21 L.Ed.2d 703 (1969); Holland v. United States, 406 F.2d 213, 216 (5th Cir. 1969); Barnett v. United States, 439 F.2d 801, 802 (6th Cir. 1971), since such hearsay would be inadmissible at the hearing itself. United States v. Pisciotta, 199 F.2d 603, 607 (2d Cir. 1952); Brady v. United States, 404 F.2d 601, 602 (10th Cir. 1968), aff'd., 397 U.S. 742, 90 S.Ct. 1463, 25 L.

2. Subsequent to Judge MacMahon's decision to dismiss, appellant learned of a state court report of wiretaps authorized during the period under question. Appellant believes that this report substantiates certain of Cassino's statements in his affidavit. We will consider that report as part of the record for this appeal.

Ed.2d 747 (1970). The petitioner must set forth specific facts which he is in a position to establish by competent evidence. Machibroda v. United States, 368 U.S. 487, 495–496, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962). Furthermore, where the petitioner has already had a full evidentiary hearing upon the same claim and seeks another hearing on grounds of newly discovered evidence, greater specificity is required than if no hearing had been held, in order to avoid relitigation of issues on the basis of proof already deemed insufficient.

[5] Applying these principles, we are satisfied that the Cassino affidavit, which is the crux of the petition, failed to meet this threshold of sufficiency. Most of the affidavit is devoted to evidence already received and considered at the 1969 suppression hearing. When it comes to the key "newly discovered" evidence offered to support the renewed claim that the federal arrest and seizure was tainted by the state wiretap Cassino's averments are not only vague, indefinite and conclusory but marbled with hearsay. Thus Cassino states that "[s]ubsequent to May, 1969, *I learned that* it was a common practice during the course of this investigation for Investigator Kaynor [of the New York state police] to take the tapes representing the previous day's eavesdropping and together with Agent John J. O'Brien of the Bureau of Narcotics and Dangerous Drugs, go to one of these rooms and there review the tapes." (Emphasis added). This is not only hearsay, but hearsay singularly lacking in specificity.[3] Cassino does not say how or from whom he learned this. His testimony along these lines would be inadmissible at a hearing on Dalli's petition. There is no indication that the wiretaps or transcripts of them were in fact furnished to the federal officers, much less that this fact would be established by competent evidence.

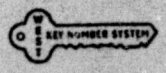
The other portion of the Cassino affidavit heavily relied upon by appellant is its vague statement to the effect that the Dalli-Simmons' meeting of September 7th "persuaded us to seek further eavesdropping assistance, and telephone numbers presently unknown to me located at or near the residence of Dalli were tapped." Although we cannot confidently say whether this averment is based on hearsay or on Cassino's personal knowledge, its indefinite form sharply reduces its substantiality. See Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Accardi v. United States, 379 F.2d 312, 313 (2d Cir. 1967). Furthermore it is somewhat inconsistent with other evidence offered as corroboration for Cassino's allegation of undisclosed wiretaps on Dalli. This evidence, to which counsel for Dalli has directed our attention, consists of a report issued by judges of the New York Supreme Court, Kings County, which schedules the applications for, and authorizations of, wiretaps during the period of June 20 to December 31, 1968 (a period relevant to the present case). The report indicates that on August 8, 1968, a district attorney sought and received approval for three wiretaps, one on a beauty parlor and two on private residences. At trial the government had disclosed only two wiretaps as related to this case, one on the Beauty Trail Hair Parlor and the other on the residence of Ronald Carr, owner of the parlor, both issued on August 8th. Dalli now suggests that the report of a third wiretap corroborates Cassino's allegation that there was a wiretap on Dalli's home. Cassino's affidavit, however, alleges that the state police were prompted to seek further taps as a result of the Dalli-Simmons meeting of September 7th, which postdates by one month the date, August 8, 1968, when the application for the third tap was granted. While the report indicates that there may have

3. The statement was nonetheless felicitously worded from Cassino's point of view. He says he learned of the cooperation between Kaynor and O'Brien *subsequent to May 1969*. May 1969 was of course the time of Cassino's appearance at the Dalli pretrial hearing where he offered testimony that conflicts with that of the affidavit.

been an unaccounted for and possibly related wiretap, it hardly provides direct corroboration for Cassino's story, especially in view of the gross disparity in time between the affidavit and the report.

[6, 7] Even if Cassino is correct in his belief that a tap was initiated on Dalli's home telephone, Cassino is not in a position to aver, and nowhere in his affidavit does he attempt to aver as a matter of personal knowledge that any information from a state wiretap was passed to federal agents. That there was any transmittal of wiretap information was denied under oath by the federal agents who testified at the original hearing. Edward Kaynor, the state police investigator reported by Cassino on the basis of an unidentified source as having passed wiretap information to the federal agents, submitted an affidavit in opposition to the appellant's motion in which he also denied each such allegation.[4] Moreover, portions of Cassino's affidavit are specifically contradicted by his prior testimony at trial.[5] Furthermore the credibility of the affidavit was for other reasons open to question.[6] With the obvious deficiencies of the Cassino affidavit viewed against the files and records of the case and in light of the fact that petitioner had already had one hearing on substantially the same claim the trial court did not err in denying the petition without a hearing.

The order below is affirmed.



4. Although opposing affidavits from the Government cannot be deemed part of the records and files of a case for purpose of showing that the petitioner is entitled to no relief under 28 U.S.C. § 2255, Taylor v. United States, 487 F.2d 307 (2d Cir. Nov. 14, 1973), they may be considered in assessing the sufficiency of the petitioner's supporting affidavit. See United States v. Catalano, 281 F.2d 184 (2d Cir.), cert. denied, 364 U.S. 845, 81 S.Ct. 88, 5 L.Ed.2d 69 (1960).

5. At the suppression hearing Cassino testified that he had no knowledge of a conversation between Dalli and Simmons on the wiretap. His affidavit now indicates that he knew of the September 7th conversation between Dalli and Simmons intercepted on the Beauty Trail Hair Parlor phone and that he knew of still another conversation be-

AFFIDAVIT OF EDWARD W. KAYNER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BARTHELMIO DALLI,
Petitioner

- against -

UNITED STATES OF AMERICA,
Respondent

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF New York

EDWARD W. KAYNER, being duly sworn, deposes and says:

That he makes this affidavit in opposition to the application of BARTHELMIO DALLI.

That I am an Investigator for the New York State Police and during the year 1968 I was assigned to the Wards Island New York City Narcotics Unit under the supervision and command of Lieutenant Charles Cassino. That during the months of August and September of 1968, my duties required me to review tapes pertaining to a New York Supreme Court ordered wire tap upon the telephones at the Beauty Trail, a beauty parlor in Brooklyn, New York.

That to my knowledge no other wire tap existed other than the aforesaid tap at the Beauty Trail in Brooklyn, New York.

That in the course of my duties as an Investigator for the New York State Police I did have personal contact with one John O'Brien, then a Federal Bureau of Narcotics Agent. That the information obtained by me from the New York State Police wire tap as aforesaid was not related to any one connected with the Federal Bureau of Narcotics. That I am familiar with an affidavit submitted by ex-Lieutenant Charles Cassino in support of this application wherein said Lieutenant Cassino avers that the information obtained from the Court ordered wire tap was related by me to the said John O'Brien. That this assertion by Lieutenant Cassino is false and hereby denied by

me. That the further assertions by Lieutenant Cassino that I was to make arrangements for eavesdropping at the Holiday Inn on September 10, 1968, and that I was to contact agents of the Bureau of Narcotics and Dangerous Drugs for the purpose of initiating the investigation and surveillance on Sept[illegible]0, 1968, which resulted in the arrest of DALLI, SIMMONS, [illegible]d BOURDEAU, are false. That on the morning of September 10, 1968, I was at a Court appearance in Goshen, New York, when I received instructions from Lieutenant Cassino to the effect that DALLI and an unknown male were traveling north from New York City on the New York State Thruway under the surveillance of agents of the Federal Bureau of Narcotics and Dangerous Drugs, and my instructions were to proceed from Goshen, New York, north to offer assistance to the Federal Agents.

That I subsequently arrived at Plattsburgh, New York, during the late afternoon on September 10, 1968, having had car trouble at or near Albany, New York, which required substitution of another car by my Albany office.

That at the time of my arrival at Plattsburgh, New York, on September 10, at all times to my knowledge the surveillance of DALLI and SIMMONS was under the direction and control of agents of the Federal Bureau of Narcotics and Dangerous Drugs.

That I have reviewed the records of the New York State Police concerning the assertion that a wire tap existed on a telephone at the residence of or near the residence of BARRY DALLI and to my knowledge no such tap existed.

s/ Edward W Kayner
EDWARD W. KAYNER

Sworn to before me this
5 day of January, 1973.

s/ Shirley G. Porto
Notary Public, State of New York
My commission expires: March 30, 1973
30-3138635

CERTIFICATE OF SERVICE

December 12, 1975

I certify that a copy of this brief and appendix has been mailed to each of the following:

The Honorable James M. Sullivan, Jr.
United States Attorney
Northern District of New York

Paul V. French, Esq.
Chief Assistant U.S. Attorney
Northern District of New York

Albert J. Krieger, Esq.
Attorney for Barthelmio Dalli

Jonathan J. Silbermann